Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

82-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. .....

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORP.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DAVID O. ELLIOTT
BARNES, RICHARDSON & COLBURN
Attorneys for Petitioner
475 Park Avenue South
New York, New York 10016
Tel. (212) 725-0200 and
1819 H Street, N.W.
Washington, D.C. 20006
Tel. (202) 457-0300

RUFUS E. JARMAN, JR.
MICHAEL A. JOHNSON
Of Counsel

Questions Presented

1. Does section 5(b) (1) (B) of the Trading with the Enemy Act (hereinafter "TWEA") (50 U.S.C. App. 5(b) (1) (B)) confer upon the President of the United States the right to take into the Treasury the property of American citizens "by regulation" thus barring suit for the return of that property under section 9(a), TWEA (50 U.S.C. App. 9(a)) by citizens who are neither enemies nor allies of enemies of the United States?

2. Does section 5(b) (1) (B), TWEA, require that monies taken from citizens of the United States by virtue of power delegated to the President thereunder be "vested" so that claims may be made thereto?

3. If citizens of the United States, admitted not to be enemies or allies of enemies of the United States, cannot maintain a suit in equity in any Court in the United States to recover their property taken under the TWEA, is the TWEA violative of the rights guaranteed to citizens by the Due Process and Just Compensation clauses of the Fifth Amendment to the Constitution?

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Introduction	1
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions and Proclamations Involved	4
Statement of the Case	5
Reasons for Granting the Writ	11
1. The Courts below have ignored the intent of Congress in enacting or amending the Trading with the Enemy Act. The legislative history of the TWEA and its amendments is wholly contrary to the decisions reached below	11
2. The decisions below, effectively denying petitioner the right to make a claim for return of its property under section 9(a), TWEA, *in any court,* are directly contrary to the precedents of this Court	13
3. The decisions of the Courts below will allow the President unbridled power both under Section 5(b), TWEA and Section 203, International Emergency Economic Powers Act, 50 U.S.C. 1702, to "regulate" property in which there is a foreign interest, by taxing it without any provision for review or return of the tax	17
Conclusion	21

Appendix:

PAGE

Constitution of the United States, Amendment, Statement and Proclamations involved, *in extenso* 1a

Judgment and Opinion of the United States Court of Appeals for the Federal Circuit 31a

Judgment and Opinion of the United States Court of International Trade 43a

Cases Cited: PAGE

Alcan Sales v. *United States*, 63 CCPA 83, C.A.D. 1170, 524 F.2d 937 (1976) *cert. den.*, 389 U.S. 976 (1976) 7, 8

Becker Steel Co. v. *Cummings*, 296 U.S. 74 (1935) ... 14, 15

Clark v. *Uebersee Finanz-Korp., A.G.*, 332 U.S. 480 (1947) 12, 13, 15, 16

Commercial Trust Company of New Jersey v. *Miller*, 262 U.S. 52 (1925) 14

Cornet Stores v. *Morton, et al.*, 632 F.2d 96 (9th Cir. 1980), *cert. den.*, 451 U.S. 957 (1981) 8

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) .. 18, 19, 20

Guessefeldt v. *McGrath*, 342 U.S. 156 (1951) 17

Henry Pollak, Inc. v. *Blumenthal, et al.*, 444 F. Supp. 56 (D.C., D.C. 1977), 193 App. D.C. 217, *aff'd mem.*, 593 F.2d 1371 (D.C. Cir. 1979), *cert. den.*, *Pollak* v. *Miller*, 444 U.S. 836 (1979) 8

Honda v. *Clark*, 386 U.S. 484 (1967) 5, 17

Gmo. Nichaus & Co. v. *United States*, 373 F.2d 944, 179 Ct. Cl. 233 (1967) 5

Kaufman v. *Societe International*, 343 U.S. 156 (1951) 17

Kokoszka v. *Belford*, 417 U.S. 642 (1974) 11

Markham v. *Cabell*, 326 U.S. 404 (1945) 15

National Railroad Passenger Corporation v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) 11

Philbrook v. *Glodgett*, 421 U.S. 707 (1975) 11

Societe Internationale v. *Rogers*, 357 U.S. 197 (1958) 17

Yoshida International Inc. v. *United States*, 71 Cust. Ct. 1, C.D. 4550, 387 F. Supp. 1155 (1974), *rev'd*, *United States* v. *Yoshida International, Inc.*, 63 CCPA 15, C.A.D. 1160, 526 F.2d 560 (1975) 7, 8, 20

Statutes Cited: PAGE

International Emergency Economic Powers Act, Section 203, 50 U.S.C. 1702 .....17, 20

Tariff Act of 1930, Section 350(a)(6) 6, 7

Trade Expansion Act of 1962, Section 255(b) 6, 7

Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*

Section 5(b) (50 U.S.C. App. 5(b)) ..1, 2, 5, 6, 7*passim*

Section 9(a) (50 U.S.C. App. 9(a)) 1, 2, 5, 8,9, 10*passim*

Section 6 (50 U.S.C. App. 6) 7

28 U.S.C. 1581(a) 8

28 U.S.C. 1585 ..... 8, 9

Congressional Documents Cited:

Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4740, 65th Cong., 1st Sess., May 29, 31st and June 4, 1917 .....11, 12

Hearings before the Senate Subcommitte on Commerce, Washington, G.P.O., 1917 12

Report No. 1507, House of Representatives, 77th Cong., 1st Sess., December 15, 1941 13

87 *Congressional Record* 9863, December 16, 1941 ... 13

87 *Congressional Record* 9845, December 16, 1941 ... 13

Executive Documents Cited:

Presidential Proclamation 4074, August 16, 1971, 36 *Fed. Reg.* 15724 ..... 6, 18

Presidential Proclamation 4098, December 20, 1971, 36 *Fed. Reg.* 24201 ..... 6, 18

Opinion of the General Counsel Treasury Department, September 29, 1971 6

1972 Economic Report of the President 70 7

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. .....

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Alcan Sales Division of Alcan Aluminum Corporation petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Federal Circuit affirming that petitioner has no cause of action for recovery of property under section 9(a), Trading with the Enemy Act (50 U.S.C. App. 9(a)), or for just compensation under the Fifth Amendment to the Constitution of the United States for property taken from it and transferred to the Treasury of the United States pursuant to Executive action under section 5(b), Trading with the Enemy Act (50 U.S.C. App. 5(b)).

Opinions Below

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 693 F. 2d 1089 (1982).

The opinion of the United States Court of International Trade is reported at 2 CIT , 528 F. Supp. 1159 (1981). The opinions of the Courts below are reproduced in the Appendix to this Petition, pages 31a-56a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1256. The judgment of the United States Court of Appeals for the Federal Circuit is dated November 18, 1982, and was entered that day.

Questions Presented

1. Does section 5(b) (1) (B) of the Trading with the Enemy Act (hereinafter "TWEA") (50 U.S.C. App. 5(b) (1) (B)) confer upon the President of the United States the right to take into the Treasury the property of American citizens "by regulation" thus barring suit for the return of that property under section 9(a), TWEA (50 U.S.C. App. 9(a)) by citizens who are neither enemies nor allies of enemies of the United States?

2. Does section 5(b) (1) (B), TWEA, require that monies taken from citizens of the United States by virtue of power delegated to the President thereunder be "vested" so that claims may be made thereto?

3. If citizens of the United States, admitted not to be enemies or allies of enemies of the United States, cannot maintain a suit in equity in any Court in the United States to recover their property taken under the TWEA, is the TWEA violative of the rights guaranteed to citizens by the Due Process and Just Compensation clauses of the Fifth Amendment to the Constitution?

Constitutional and Statutory Provisions and Proclamations Involved*

Constitution of the United States, Amendment V, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

International Emergency Economic Powers Act, Pub. L. 95-223, Title II, § 203, 50 U.S.C. 1702

Tariff Act of 1930, Section 350(a)(6), as amended, 19 U.S.C. 1351(a)(6)

Trade Expansion Act of 1962, Section 255(b), as amended, 19 U.S.C. 1885(b)

Trading with the Enemy Act, 40 Stat. 411, section 2, 50 U.S.C. App. 2

Trading with the Enemy Act, as amended, section 5(b), 50 U.S.C. App. 5(b), in pertinent part:

> (b)(1) During the time of war [or during any other period of national emergency declared by the President,] the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—
>
> * * * *
>
> (B) . . . regulate . . . importation . . . or transactions involving, any property or interest in

---

* [All provisions, statutes and proclamations involved not fully set forth here, are set out *in extenso* in the Appendix hereto, p. 1a, ff.]

> which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President . . .

Trading with the Enemy Act, as amended, section 7(c), 50 U.S.C. App. 7(c)

Trading with the Enemy Act, as amended, section 9(a), 50 U.S.C. App. 9(a), in pertinent part:

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, . . . may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by . . . the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled.

28 U.S.C. 1581(a):

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to

contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

28 U.S.C. § 1585:

> The Court of Internatiinal Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

Presidential Proclamation 4074, August 16, 1971, 36 *Fed. Reg.* 15724

Presidential Procalmation 4098, December 20, 1971, 36 *Fed. Reg.* 24201.

Statement of the Case

This case arises because of the exercise of authority found to have been delegated to the President under section 5(b)(1)(B) of the Trading with the Enemy Act (hereinafter "TWEA") (50 U.S.C. App. 5(b)(1)(B)). Like much past litigation involving the TWEA (*see: Honda* v. *Clark*, 386 U.S. 484 (1967), *Gmo. Niehaus & Co.* v. *United States*, 373 F. 2d 944, 179 Ct. Cl. 233 (1967)), this litigation has been protracted. Unlike claimants in these prior cases, claimants for recovery of the 1971 "surcharge" have had to wrest from the Executive through litigation all information pertaining to the la wunder which the President acted in taking the funds which petitioner claims belongs to it and in dealing in those funds after the initial taking. Moreover, in endeavoring to litigate its claims under section 9(a), TWEA (50 U.S.C. App. 9(a)), petitioner and others have confronted arguments in the district courts of the United States that the litigations should be carried forward only in the Customs Court (now the United States Court of International Trade), and, upon prosecution of suit in the Court of International Trade, the argument that suit could only be litigated in the district courts. Finally, the court below has effectively

decded that no suit will lie *in any Court* of the United States under section 9(a), TWEA, for the recovery of monies taken from petitioner under section 5(b)(1)(B), TWEA, and has extended to the President of the United States unreviewable powers to "regulate" property claimed by United States citizens by taking it into the Treasury of the United States, without any claim for its return.

At issue, therefore, is whether the Courts of the United States may nullify acts of Congress intended to protect citizens of the United States from arbitrary Executive action and whether the Executive is, in future, to have unbridled authority to "regulate" away the property of citizens under section 5(b)(1)(B), TWEA, or other statutes.

The history of this case is, briefly, as follows:

On August 15, 1971, President Nixon declared a national emergency and issued Presidential Proclamation 4074, effective August 16, 1971 (printed in the Appendix hereto, 17a ff.). The proclamation recited a balance of payments crisis and called upon all citizens to aid the government in relieving it. However, while the crisis was stated to concern the whole nation, the proclamation imposed a "surcharge" assessment of up to ten percent (10%) of the dutiable value upon the importation of most merchandise from non-Communist countries, thereby requiring immediate sacrifice only from importers. The statutory authorities specifically asserted in Proclamation 4074 for this surcharge assessment were section 350(a)(6) of the Tariff Act of 1930, as amended, and section 255(b) of the Trade Expansion Act of 1962. These specific bases of statutory authority were reiterated in an Opinion of the General Counsel of the Treasury entitled "Legal Bases for the Imposition of a Surcharge," issued September 29, 1971 (*see: Appendix,* p. 22a ff.), and in Presidental Proclamation 4098, issued December 20, 1971, terminating the surcharge (*see: Appendix,* p. 25a ff.).

No specific reference was made in any of these Executive documents to the Trading with the Enemy Act, thus furnishing no one any knowledge that action was being prelicated upon that statute. Moreover, in the President's economic report to Congress the next year (Economic Report of the President 70, (1972)), no mention was made of the President's having acted under the TWEA, although section 6, TWEA (50 U.S.C. App. 6) requires annual specific reports to Congress for any action thereunder. Such reports were never filed with regard to the 1971 surcharge.

Subsequently, importers who had paid the surcharge assessment believing it to have been imposed as announced in p. 4074, *i.e.,* pursuant to section 350(a)(6) of the Tariff Act of 1930, as amended, and section 255(b) of the Trade Expansion Act of 1962, brought suit in the United States Customs Court (now the Court of International Trade), claiming that the surcharge assessment in the form of customs duties was an *ultra vires* act by the President under the specific statutes referenced to justify it. This claim of illegality was sustained in *Yoshida International, Inc.* v. *United States,* 71 Cust. Ct. 1, C.D. 4550, 387 F. Supp. 1155 (1974). In its reply to plaintiff's motion for summary judgment in the Customs Court in *Yoshida, supra,* the Government for the first time cited section 5(b), TWEA, as a justification for the imposition of the surcharge. This justification was also rejected by the Customs Court in *Yoshida, supra,* but was held sufficient to negate an *ultra vires* Presidential act by the Court of Customs and Patent Appeals in *United States* v. *Yoshida International Inc.,* 63 CCPA 15, C.A.D. 1160, 526 F. 2d 560 (1975); and again in *Alcan Sales* v. *United States,* 63 CCPA 83, C.A.D. 170, 524 F. 2d 937, cert. den., 389 U.S. 976 (1976).

The source of the delegation of power to impose the surcharge having been located by the Court of Customs and

Patent Appeals in *United States* v. *Yoshida, supra,* as section 5(b), TWEA, and affirmed in *Alcan Sales, supra,* several hundred claimants (including petitioner here) filed suit in the United States District Courts for the District of Columbia and for the Central District of California, claiming right, title, and interest in the surcharge monies under section 9(a), TWEA. In *Henry Pollak, Inc.* v. *Blumenthal, et al.,* 444 F. Supp. 56 (D.C. D. C., 1977), *aff'd mem.,* 593 F. 2d 1371 (D.C. Cir., 1979), *cert. den.,* 444 U.S. 836 (1979), and *Cornet Stores* v. *Morton, et al.,* 632 F. 2d 96 (9th Cir., 1980), *cert. den.,* 451 U.S. 957 (1981), the Government moved to dismiss for lack of jurisdiction, arguing that, despite the clear grant of jurisdiction to the District Courts contained in section 9(a), al suits involving the surcharge should be heard exclusively in the Customs Court. The lower courts agreed with this argument and were affirmed by their appellate tribunals in dismissing for lack of jurisdiction. This Court denied *certiorari* in both instances. Since the Government did not respond to the complaints in any of these actions, it never admitted whether claimants were United States citizens, whether they were not enemies or allies of enemies of the United States, whether they had paid monies to the Treasury of the United States, nor whether said monies had been vested according to section 5(b), TWEA, or were being held for any policy purpose under the statute.

The Government having pleaded that all issues involving the surcharge should be tried in the Customs Court, and that Court having been reconstituted the United States Court of International having all the power in equity granted by statute to a district court of the United States (*see:* 28 U.S.C. 1585), petitioner continued the prosecution of the instant action brought pursuant to 28 U.S.C. 1581(a) which had been stayed in the Customs Court pending resolution of the jurisdictional dispute raised in *Pollak, supra.*

The Government in the action below, claimed lack of jurisdiction, reversing its arguments in the district courts, and claiming that the Court of International Trade was without jurisdiction to hear petitioner's claim under section 9(a), TWEA. However, in the Court of International Trade, this claim was asserted as an affirmative defense in the Government's answer which was followed by a motion for summary judgment both on the jurisdictional grounds and for failure to state a claim upon which relief could be granted. In moving for summary judgment, the Government was finally forced to admit that petitioner is a corporate citizen of the United States, that its monies were taken pursuant to section 5(b), TWEA, that petitioner is not an enemy or ally of enemy of the United States, nor was it at any time, and that the Executive has not "vested" petitioner's monies pursuant to section 5(b), TWEA, nor is it holding them for any policy purpose.

The Court of International Trade held that it had jurisdiction of the action under 28 U.S.C. 1581(a), and that, having such jurisdiction, it might entertain petitioner's claim under section 9(a), TWEA. However, it held that the imposition of the surcharge under section 5(b), TWEA, was a "regulatory" act on the part of the President which did not "cause a vesting" under that same section. Therefore, the Court of International Trade found that petitioner had failed to state a cause of action under section 9(a), TWEA, or under the Just Compensation Clause, and granted the government's motion for summary judgment.

Section 9(a), it should be noted, does not refer to "vested" property, in permitting claims for monies transferred to the Treasurer of the United States. However, since the Government had alleged that vesting was a prerequisite to petitioner's claim, petitioner also moved the Court of International Trade to mandamus appropriate

government officials to vest the monies. The Court of International Trade denied such mandamus motion, because of its holding that vesting is not required by section 5(b), TWEA.

The United States Court of Appeals for the Federal Circuit (formerly the United States Court of Customs and Patent Appeals) affirmed the holding of the Court of International Trade that no claim would lie under section 9(a), TWEA, for return of the surcharge monies, because the President was delegated two distinct and unrelated powers under section 5(b), TWEA: (1) the power to regulate, which immunizes his actions from suit for return under section 9(a), and (2), the power to "vest" property, which vesting *might* be reviewable under section 9(a). Thus, Presidential "regulatory" action under section 5(b) is insulated from citizens' claims for return under section 9(a). If the President chooses to "vest" the property "regulated" under section 5(b), a suit may lie. The Court of Appeals for the Federal Circuit disagreed with the Court of International Trade, and opined that a suit under section 9(a), TWEA, could not be heard in the Court of International Trade in any event.

Thus, petitioner has extracted from the Government in various fora: (1) knowledge that the President was really imposing the surcharge under section 5(b), TWEA, in 1971, although he claimed specific authorization under the tariff and trade laws of the United States; and (2) admissions that petitioner is not, nor was it ever, an enemy or ally of enemy of the United States; that its money was covered into the Treasury of the United States, but has not been vested; and that there is no public policy reason for the Government to be holding it. Now the Court below teaches that petitioner can bring no claim under section 9(a), TWEA, for return of its property *in any court in the United States,* because the taking of its property was a "regulatory" act of the President, for

which he does not have to account to plaintiff, despite the remedy enacted in section 9(a), TWEA, by Congress for the benefit of United States citizens. Furthermore, the Courts below have held that section 9(a), TWEA, never did apply to "regulatory" measures taken under section 5(b), TWEA, in time of national emergency, thus reading the section from the Act. They have also held that this deprivation of property without just compensation is not a taking for which claim may be made under the Fifth Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT

1. The Courts below have ignored the intent of Congress in enacting and amending the Trading with the Enemy Act. The legislative history of the TWEA and its amendments is wholly contrary to the decisions reached below.

The decisions of the Court of Appeals for the Federal Circuit and the United States Court of International Trade violate the fundamental rule of statutory construction that legislative intent is paramount. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

In *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4704*, 65th Cong., 1st Sess., May 29th, 31st and June 4, 1917, p. 54, the intent that citizens have the right to sue for return of their property taken under the TWEA was affirmed by the drafter of the legislation:

> The Chairman . . . I should like to ask Mr. Warren if there is anything in this bill that would prevent any

> loyal citizen of this country whose rights were infringed from bringing suit to enforce his rights against the custodian *or anybody else.*
> Mr. Warren. I do not know of any. [Emphasis added.]

Further, in the *Hearings before the Senate Subcommittee on Commerce,* Washington, G.P.O. 1917, at pp. 148-149, Mr. Warren explained the protection afforded citizens by section 9, TWEA as follows:

> By section 9 . . . we provided a method by which, after any property had been *taken over by direction of the President,* any American citizen who might have any claim to that property or any right in that property was given a means by which his claim could be established. Of course, *it would not be fair to take over money into the Treasury of the United States without providing for some possibility that there might be adverse claims of American citizens which should be protected, and in the most general terms we made a provision protecting claims of United States citizens.*
>
> We provided that any person—*that includes corporations* and partnerships—not an enemy or ally of enemy, claiming any interest or right or title in *any money* or property . . . might bring suit in any district court of the United States . . . That is, we made *a general clause in as general language as we could make it* so as to cover *any particle of claim* that any citizens might have to this money. [Emphasis supplied.]

At the outset of the Second World War the TWEA was amended—"hastily" as the Court had occasion to note in *Clark* v. *Uebersee Finanz-Korp., A.G.,* 332 U.S. 480, 488 (1947)—but never with any thought of removing citizens'

rights to sue for return of their property.[1] Representative Kefauver in debate on the floor of the House made specific reference to *Report No. 1507, House of Representatives,* 77th Cong., 1st Sess., December 15, 1941, as follows:

> If you will read the present section 5(b) on page 4 of the report, which is the old act as amended by the act of March 9, 1933, and May 7, 1940, *I do not see how there can be any questions in the mind of anybody but that the first part* [*5(b)(1)(A)*] *applies to anybody in the jurisdiction of the United States and the second part* [*5(b)(1)(B)*] applies to foreign interests or the *interests of foreign governments. I think it is entirely clear.* [87 *Cong. Rec.* 9863, Emphasis added.]

The intention that the President have no further power over the property of American citizens under the 1941 amendments than President Wilson had under the TWEA as originally enacted was also made clear in the Senate in an exchange between Senator Vandenberg and Senator Van Nuys at 87 *Cong. Rec.* 9845.

2. The decisions below, effectively denying petitioner the right to make a claim for return of its property under section 9(a), TWEA, *in any court,* are directly contrary to the precedents of this Court.

The Court of Appeals for the Federal Circuit makes no reference in its opinion to any precedent of this Court. The Court of International Trade endeavors to construe from the word "also" in a footnote to *Clark* v. *Uebersee,*

---

[1] This Court stated the guidelines for interpretation of the TWEA in *Clark, supra,* at 488 (Emphasis supplied): "We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give *all of it*—1917 to 1941—*the most harmonious, comprehensive meaning possible.*"

supra, a theory of the meaning of section 5(b)(1)(B), TWEA, wholly at odds with this Court's holding in that very case. *Clark, supra*, holds that any person, claiming not to be an enemy or ally of enemy of the United States, may maintain suit under section 9(a), TWEA, for return of his property. Moreover, *Clark, supra*, is but one in a long line of cases, both before and after the 1941 amendments to section 5(b), TWEA, which so hold.

In *Commercial Trust Company of New Jersey* v. *Miller*, 262 U.S. 52, 53 (1923), this Court gave the following comprehensive description of the TWEA:

> In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war, and its procedure is accommodated to and made adequate to its purpose, *but securing as well, the assertion of opposing or counterrailing rights "by a suit in equity, unembarrassed by the President's executive determination," and, if the claimant prevails, the property is to be forthwith returned to him.* **[Emphasis added.]**

In rejecting a purported limitation of that right in *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79 (1935), Justice Stone found for the Court:

> . . . In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient. The implication that by the appropriation of private property to public use the United States undertakes to make just compensation for it . . . must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. *Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the govern-*

> *ment granted in recognition of an obligation imposed by the Constitution. . . . Hence, Section 9(a) must be broadly construed to give effect to its remedial purpose.* (Emphasis added.)

The argument, accepted by the Courts below, that the 1941 amendments of section 5(b) cut off a petitioner's right to suit was rejected by this Court immediately following World War II. In *Markham* v. *Cabell*, 326 U.S. 404, 410-411 (1945), this Court unanimously held:

> The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full play as possible.

Yet the Courts below have done just the opposite in their unprecedented constructions of these very two sections, which had not been amended since the decision in *Markham, supra,* when the subject Presidential action was taken in 1971 and petitioner was forced to give its money over to the Treasury of the United States for the public good in a national emergency. Surely it cannot be presumed that Congress intended citizens to have fewer rights as the result of actions taken in national emergencies than they have for action taken in time of *war.* Yet such is the effect of the decision below.

Further, in the very passage in *Clark* v. *Uebersee, supra,* where a footnote was relied upon by the Court of International Trade, this Court specifically rejected the argument that the scope of relief available under section 9(a), TWEA, may be limited by restrictive construction of sec-

tion 5(b). This Court described the relevant rejected argument thus at 332 U.S. 486:

> Petitioner [the Executive delegate] . . . therefore suggests that once the seizure is shown to be permissible under § 5(b), there is no remedy for the return of the property under § 9(a). It is said that § 9(a) was designed to provide an ultimate judicial determination of the question whether the property seized was within the vesting power defined in § 5(b) . . . The argument accordingly is that since § 5(b) allows seizure and vesting of "any property or interest of any foreign country or national thereof," a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.
>
> That is to make the right to sue run not to "any person not an enemy or ally of enemy" as § 9(a) in terms provides but to "any person not an enemy or ally of enemy or national of any foreign country." That would wipe out all suits to reclaim property brought by any foreign interest, no matter how friendly. We stated in Markham v. Cabell, 326 U.S. 404, 410, 411, "The right to sue, explicitly granted by § 9(a) should not be read out of the law unless it is clear that Congress by what it later did withdraw its earlier permission."

This Court concluded that Congress had not withdrawn or curtailed the right to sue contained in § 9(a) by the 1941 amendments to section 5(b). Further, this Court found that the status of the property as properly vested or not vested was irrelevant to the maintenance of the suit provided by Congress in section 9(a).

Clark v. *Uebersee, supra,* has not been distinguished by the Courts below. Except for the misinterpretation of a footnote, it has simply been ignored, as have all the other decisions of this Court. In addition to those already men-

tioned relevant decisions include *Kaufman* v. *Societe Internationale*, 343 U.S. 156, 159 (1951); *Guessefeldt* v. *McGrath*, 342 U.S. 308, 317-319 (1952); *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958); and *Honda* v. *Clark*, 386 U.S. 484 (1967).

Although further amended after the events in question, the TWEA, including both sections 5(b) and 9(a), remains a statute which may be invoked by the Executive without further Congressional action in time of war. In such circumstances, prompt and decisive action must frequently be taken in the heat of the moment. Under section 5(b), such action may not be resisted by citizens when taken. This Court has until now, however, preserved the citizen's right to sue subsequently when the exigency has passed and the facts can be sorted. It should hear this case to make certain that this right remains.

3. The decisions of the Courts below will allow the President unbridled power both under Section 5(b), TWEA and Section 203, International Emergency Economic Powers Act, 50 U.S.C. 1702, to "regulate" property in which there is a foreign interest, by taxing it without any provision for review or return of the tax.

As this Court recognized in *Dames & Moore* v. *Regan*, 453 U.S. 654, 672 (1981), the "regulatory" provisions of section 5(b), TWEA, have been taken over almost *verbatim* in section 203, Title II, International Emergency Economic Powers Act (hereinafter "IEEPA"), 50 U.S.C. 1702 (a)-(1)(B). The IEEPA does not provide for the recovery of property claimed by United States citizens with a provision similar to section 9(a), TWEA, but this Court stated in *Dames, supra*, at 675:

> We conclude that although the IEEPA authorized the nullification of the attachments [obtained under

> voidable licenses from the Executive], it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An in personam lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA theretofore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question.

The facts of *Dames, supra,* regarding the President's actions are quite different from the facts shown by the issuance of Presidential Proclamation 4074 in 1971, but the differences only fortify petitioner's claims.

First, in *Dames,* the President exercised his authority to "regulate" property in the United States having a foreign interest. He announced that he was doing so under the IEEPA, and citizens were thus notified that they and property claimed by them were thus subjects of such "regulation." Such was not the case in PP 4074, 1971.

Second, the foreign interests regulated in *Dames, supra,* were transferred to Iran under agreements saving to United States citizens their claims, both before an International Claims Tribunal, and before the Courts of the United States. The property which petitioner here claims, on the other hand, was transferred to the General Treasury of the United States. While its transfer facilitated the negotiations of the Smithsonian Agrement referenced in PP 4098, 1971, none of the property was used for settlement of foreign claims, and the government admitted below that it will not be so used. Petitioner's monies are not being held in blocked or frozen accounts, and the

United States has advanced no public policy purpose for refusing return thereof to petitioner and other claimants.

Yet the appellate tribunal below decided in *United States* v. *Yoshida, supra,* that plaintiff's property could only be regulated as it was in PP 4074 by virtue of section 5(b), TWEA, because of the foreign interest which it possessed (63 CCPA 15, 24, C.A.D. 1160, 526 F. 2d 560 (1975). Now, however, the Court below denies petitioner the right to sue for its return under section 9(a), TWEA, even though the property has been transferred to no foreign country and is not being retained by the United States for any public purpose. Thus, petitioner is forced to foot the bill for the negotiation of the Smithsonian Agreement—an agreement which benefited all citizens.

It was to prevent just such consequences that Congress enacted section 9(a), TWEA. It was likewise for such reasons that this Court in *Dames, supra,* (453 U.S. at 689) extracted from the Government the promise that said petitioner's action for just compensation would not be barred in the Court of Claims. Justice Powell empasized the point in concurring (453 U.S. 691):

> I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of

our courts.[2] The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

---

[2] As the Court held in *Armstrong* v. *United States*, [364 U.S. 40 (1960)], at 49:

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Court unanimously reaffirmed this understanding of the Just Compensation Clause in the recent case of *Agins* v. *City of Tiburon*, 447 U.S. 255, 260-61 (1980).

Yet the Court below has construed section 5(b), TWEA, in such a manner as to cut off petitioner's right to sue under the specific remedial section enacted by Congress to reclaim its own property, and has further found that petitioner has no claim pursuant to the Just Compensation Clause of the Constitution.

When it is realized that this same Court of Appeals for the Federal Circuit will review all claims made for takings under the IEEPA by virtue of its appellate review of the United States Claims Court, the magnitude of the error below and the necessity for its review by this Court are apparent.

Laws enacted by Congress to secure the nation in times of war or national emergency must be supervised and reviewed by this Court so that, when the emergencies arise, both the Executive and the citizenry will be aware of their prerogatives, duties, and rights. The decisions below create a gigantic loophole in the interpretation of Section 5(b), TWEA, and likewise in Section 203, IEEPA, to wit:

All the president need do to avoid the possibility of review for action under section 5(b) or Section 203 is to clothe confiscation in the raiment of a tax. Thus, arguably, he does not take property, *per se*—he simply taxes it. The Court should review the decisions below to prevent such possibility.

CONCLUSION

Because the decisions of the Courts below are contrary to the clearly expressed legislative intent of Congress, are in direct conflict with the decisions of this Court, and negate the protection of citizens guaranteed to them by the Just Compensation Clause of the Constitution, reaffirmed only last term by this Court, petitioner most respectfully prays that this Court grant the instant writ.

Respectfully submitted,

David O. Elliott
Barnes, Richardson & Colburn
475 Park Avenue South
New York, New York 10016
Tel. (212) 725-0200 and
1819 H Street, N.W.
Washington, D. C. 20006
Tel. (202) 659-8404
Attorneys for Petitioner

Rufus E. Jarman, Jr.
Michael A. Johnson
Of Counsel

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes and Proclamations Involved.

(Including Presidential Proclamations 4074 and 40968 and Opinion No. 822 of the General Counsel of the Treasury)

International Emergency Economic Powers Act, Public Law 95-223, Title II, § 203, 50 U.S.C. 1702

§ 1702. Presidential authorities

(a) (1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to

enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value; or

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

Tariff Act of 1930, Section 350(a)(6), as Amended, 19 U.S.C. 1351 (a)(6).

(6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Trade Expansion Act of 1962, Section 255(b), as Amended, 19 U.S.C. Sec. 1885(b).

(b) The President may at any time terminate, in whole or in part, any proclamation made under this subchapter.

Trading With the Enemy Act, 40 Stat. 411, as Amended, 50 U.S.C. Sec. 1, et seq.

Trading With Enemy Act, 50 U.S.C. App. § 2.

§ 2. Definitions

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [sections 1-6, 7-39 and 41-44 of this Appendix]—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which

Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act [sections 1-6, 7-39 and 41-44 of this Appendix].

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

Oct. 6, 1917, c. 106, § 2, 40 Stat. 411.

Trading With the Enemy Act.

Section 5(b), 50 U.S.C. App. Section 5(b).

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exploration of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove pro-

vided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursunat to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to any thing done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent

with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Trading With the Enemy Act, Section 7(c), 50 U.S.C. App. Section 7(c).

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, chooses [sic] in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix].

Any requirement made pursuant to this Act [sections 1-6, 7-39 and 41-44 of this Appendix], or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights

as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

Trading With the Enemy Act, Section 9(a), 50 U.S.C. App. 9a

§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover; sale of claimed property in time of war or during national emergency

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States Dis-

trict Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further,* That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net

proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

Trading With the Enemy Act.

28 U.S.C. 1582.

§ 1582. Jurisdiction of the Customs Court

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties,

charges or exactions have been paid at the time the action is filed.

(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues may be included in a single civil action. Actions may be consolidated by order of the court or by request of the patries, with approval of the court, if there are common issues.

Presidential Proclamation 4074, August 16, 1971, *1971 U.S. Code Congressional and Administrative News*, p. 2486.

PROCLAMATIONS

No. 4074

August 17, 1971, 36 F.R. 15724

IMPOSITION OF SUPPLEMENTAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended[9] (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962[10] (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

WHEREAS, under the Tariff Act [,] the TEA, and other provisions of law, the President may, at any time, modify or terminate in whole or in part, any proclamation made under his authority;

---

[9] 19 U.S.C.A. § 1202 et seq.

[10] 19 U.S.C.A. prec. § 1202.

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a. m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the colmun 2 rate shall apply.

C. To implement section B of this Proclamation, the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States:

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES

Subpart C headnotes:

1. This subpart contains modifications of the provisions of the tariff schedules proclaimed by the President in Proclamation 4074.

2. **Additional duties imposed**—The duties provided for in this subpart are cumulative duties which apply in addition to the duties otherwise imposed on the articles involved. The provisions for these duties are effective with respect to articles entered on and after 12:01 a. m., August 16, 1971, and shall continue in effect until modified or terminated by the President or by the Secretary of the Treasury (hereinafter referred to as the Secretary) in accordance with headnote 4 of this subpart.

3. **Limitation on additional dutes**—The additional 10 percent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

4. For the purposes of this subpart—

(a) Delegation of authority to Secretary—The Secretary may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States.

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

(b) Publication of Secretary's actions—All actions taken by the Secretary hereunder shall be in the form of modifications of this subpart published in the Federal Register. Any action reimposing the additional duties on an article exempted therefrom by the Secretary shall be effective only with respect to articles entered on and after the date of publication of the action in the Federal Register.

(c) Authority to prescribe rules and regulations—The Secretary is authorized to prescribe such rules and regulations as he determines to be necessary or appropriate to carry out the provisions of this subpart.

5. Articles exempt from the additional duties—In accordance with determinations made by the Secretary in accordance with headnote 4(a), the following described articles are exempt from the provisions of this subpart:

* * * * * * * * * * *

Item	Article	Rates of duty	
		1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements	10% ad val. . . (See headnote 3 of this subpart.)	No change.

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

D. This Proclamation shall be effective 12:01 a. m., August 16, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of August in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

RICHARD NIXON.

Presidential Proclamation 4098, December 20, 1971, *1971 U.S. Code Congressional and Administrative News*, p. 2512.

PROCLAMATIONS

No. 4098

December 22, 1971, 36 F.R. 24201

TERMINATION OF ADDITIONAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, in order to impose a surcharge required by the balance of payments position of the United States, Proclamation 4074, dated August 15, 1971, terminated in part for such period as necessary prior Presidential Proclamations insofar as such proclamations were inconsistent with, or proclaimed duties different from, those made effective pursuant to the terms of Proclamation 4074;

WHEREAS, a multilateral agreement has been reached among the Group of Ten major industrial nations which permits removal of the surcharge;

WHEREAS, under section 350(a) (6) of the Tariff Act of 1930, as amended[24] (hereinafter referred to as "the Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA")[25] and other authority, the President may, at any time, terminate, in whole or in part, for such period as may be necessary, any proclamation, issued pursuant to section 350 of the Tariff Act or Title II of the TEA;

---

[24] 19 U.S.C.A. § 1351(a) (6).

[25] 19 U.S.C.A. § 1885(b).

Presidential Proclamation 4098, December 20, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2512.

WHEREAS, under section 350(a) (1) (B) of the Tariff Act[26] and section 201(a) (2) of the TEA,[27] the President may proclaim modifications of any existing duty as he determines to be required or appropriate to carry out trade agreements entered into under the authority of those Acts; and

WHEREAS, I hereby determine that modification of existing duties to restore the rates of duty applicable on August 15, 1971, terminated in part for such period as necessary by Proclamation 4074,[28] is required or appropriate to carry out such trade agreements;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby terminate paragraphs B and C of Proclamation 4074.

B. I hereby proclaim such modification of duties as is necessary to restore the rates of duty in effect on August 15, 1971.

C. To implement this Proclamation, the subpart inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States, entitled "SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES" is deleted therefrom.

---

[26] 19 U.S.C.A. § 1351(a) (1) (B).

[27] 19 U.S.C.A. § 1822(a) (2).

[28] 19 U.S.C.A. prec. § 1202 note.

Presidential Proclamation 4098, December 20, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2512.

D. This Proclamation shall be effective with respect to merchandise entered, or withdrawn from warehouse, for consumption on or after December 20, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of December in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

RICHARD NIXON.

Opinion, General Counsel, Treasury Department, No. 822.

THE GENERAL COUNSEL OF THE TREASURY
Washington, D.C. 20220

(SEAL) Sep 29 1971

Opinion of the General Counsel

LEGAL BASIS FOR THE IMPOSITION OF A SURCHARGE

On August 15, 1971, the President issued Proclamation No. 4074 (36 F.R. 15724, August 17, 1971) by which he terminated in part prior proclamations which carried out trade agreements in order to provide, for such period as may be necessary, an additional 10 percent *ad valorem* duty on dutiable imports.

The statutory authority for imposition of the surcharge by terminating prior proclamations is found in section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351; hereinafter the "Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1885; hereinafter the "TEA"). The authority for reinstatement of concession rates is contained in these provisions as well as in section 201(a)(2) of the TEA (19 U.S.C. 1821) and section 350(a)(1)(B) of the Tariff Act (19 U.S.C. 1351).

Termination of Tariff Concession Proclamations

Pursuant to a legislative grant of authority, the President has entered into international trade agreements providing for concession rates of duty on a broad range of products. In order to give domestic effect to these international agreements, Presidential proclamations have established concession rates in the Tariff Schedules of the United States (19 U.S.C. 1202). It is these proclamations that the President terminated in part in order to impose the surcharge by establishing an additional 10 percent *ad*

valorem rate of duty.* The total rate of duty, including the additional rate of duty, is in no case higher than the column 2 statutory rate, and in most cases is an intermediate rate between the column 2 rate and the most recent concession rate.

This action to impose an additional duty was taken by the President under sections 350(a)(6) of the Tariff Act and 255(b) of the TEA. Under these sections, Congress authorized the President to "at any time terminate, in whole or in part, any proclamation" made to carry out trade agreements under these Acts. With respect to some articles, particularly those to which application of the surcharge has resulted in a total rate of duty equal to the full column 2 rate, the President has used his full power to terminate prior proclamations (insofar as the rate is concerned); and with respect to other articles for which intermediate rates were established, he used his authority to terminate in part (insofar as the rate is concerned).

There are no conditions or qualifications placed on the President's termination authority under sections 350(a)(6) or 255(b). There is no evidence in the legislative history either of the Tariff Act or of the TEA that the President's authority to terminate prior proclamations was to be any less broad than its language would suggest. On the contrary, the retention of the same unqualified language for almost forty years although there have been numerous

---

* Paragraph B of Proclamation 4074 states in relevant part:

"(1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. . . ."

amendments of the trade agreements authority indicates a Congressional intention to grant to the President broad discretionary power in this area. When originally enacted in 1934 as part of the Reciprocal Trade Agreements Act (48 Stat. 943), the termination authority formed the concluding sentence of subsection (a)(2) of section 350, and provided: "The President may at any time terminate any such proclamation in whole or in part." Although Congress frequently amended other provisions of section 350(a) of the Tariff Act, the termination authority remained unqualified. In 1962, when Congress passed the TEA, it repealed (section 257(b) of the TEA) portions of section 350(a), but retained the termination authority as part of the Tariff Act and added this same unqualified authority to terminate proclamations to the TEA.

In addition, the courts have generally given a broad construction to the President's termination powers and have refused to imply limitations on these powers. *American Bitumuls and Asphalt Co. et al.* v. *United States,* 44 CCPA 199 (1957), *cert. den.* 355 U.S. 883 (1957); *United States* v. *Metropolitan Petroleum Corp.,* 42 CCPA 38 (1954); *Baer* v. *United States,* 8 Cust. Ct. 104 (1942); and *Barclay and Company, Inc.* v. *United States,* 41 Cust. Ct. 135, C.D. 2031 (1958), *affirmed,* 47 CCPA 133, C.A.D. 745 (1960).

Thus, the language of the statute, the legislative history and the broad interpretation given to the termination authority by the courts clearly show that the President had authority under sections 350(a)(6) of the Tariff Act and 255(b) of the TEA to impose the import surcharge.

The Restoration of Previously Proclaimed Tariff Concession Rates

The further question has been raised of whether the power to terminate trade agreement proclamations vested

in the President by Congress is confined solely to ending completely the application of a concession rate granted under an international agreement or whether the President may restore by proclamation the terminated rate at a future time pursuant to the still valid international trade agreement providing for the concession rate.

The President has authority under the words "in part" contained in sections 255(b) of the TEA and 350(a)(6) of the Tariff Act to suspend proclamations implementing trade agreements by terminating them for a period of time.

In addition, there is authority in section 201(a)(2) of the TEA and section 350(a)(1)(B) of the Tariff Act to implement trade agreements by restoring previously terminated concession rates. Section 201 of the TEA which contains the basic authority of the Executive for trade agreements provides in relevant part:

> SEC. 201. BASIC AUTHORITY FOR TRADE AGREEMENTS.
>
> (a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 102 will be promoted thereby, the President may—
>
> (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
>
> (2) proclaim such modification or continuance of any existing duty . . . as he determines to be required or appropriate to carry out any such trade agreement.

Similar authority for proclaiming modifications of existing duties is contained in section 350(a)(1)(B) of the Tariff Act.

Thus, under both the TEA and the Tariff Act, the President is authorized to proclaim changes in existing duties whenever he determines that such changes are required or appropriate to carry out any trade agreements entered into under the authority of these Acts. In the present case, modifications of existing duties to remove the surcharge and reinstitute the full concession rates would clearly be appropriate to carry out prior trade agreements entered into under the authority of the TEA and the Tariff Act. The continuing validity of these trade agreements was in no way affected by Proclamation No. 4074 and they remain in full effect.

The time limitation applicable to the authority for entering into new agreements (*i.e.*, after June 30, 1962, and before July 1, 1967) under the TEA is not applicable to proclaiming the internal effectiveness of trade agreements entered into prior to July 1, 1967. The language of section 201 makes clear that the time limitation applies solely to entering into new trade agreements and not to proclaiming the internal effect of trade agreements entered into prior to July 1, 1967. Moreover, the legislative history explicitly supports this interpretation of the statutory language. The technical explanation of the bill in the House Report of the Trade Expansion Act of 1962 specifically provides that there is no time period in which proclamations under section 201(a)(2) must be issued. (H. Rept. No. 1818, 87th Cong., 2d Sess., 34 (1962)). Similarly, time limitation provisions in section 350 of the Tariff Act have no application to the proclamation authority contained in section 350(a)(1)(B).

Conclusion

It is concluded, therefore, that the President has authority under the Tariff Act of 1930, as amended, and the

Opinion, General Counsel, Treasury Department, No. 822.

Trade Expansion Act of 1962 to levy the additional duty and at a later date to restore the Tariff concessions that had been terminated.

SAMUEL R. PIERCE, JR.
Samuel R. Pierce, Jr.
General Counsel

Judgment and Opinion of the United States Court of Appeals for the Federal Circuit Affirming the Judgment of the United States Court of International Trade, 593 F. 2d 1189 (1982).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 82-17

Court No. 77-8-01635

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORP.,
Appellant,

v.

THE UNITED STATES,
Appellee.

JUDGMENT

ON APPEAL from the Court of International Trade
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: AFFIRMED.

DATED November 18, 1982

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk
GEORGE E. HUTCHINSON
Clerk

A True Copy GEORGE E. HUTCHINSON,
Attest
Clerk, United States Court of Appeals
for the Federal Circuit
Certified this 14th day of December
1982

ISSUED AS A MANDATE: December 13, 1982.

By /S/ W. Richard Sienkiewich
Deputy

Opinion of the United States Court of Appeals for the Federal Circuit Affirming the Judgment of the United States Court of International Trade, 593 F. 2d 1189 (1982).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 82-17

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORP.,

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: November 18, 1982

Before MARKEY, *Chief Judge,* BENNETT and SMITH, *Circuit Judges.*

BENNETT, *Circuit Judge.*

This is an appeal from a decision of the United States Court of International Trade, *Alcan Sales* v. *United States,* 528 F. Supp. 1159 (Ct. Int'l Trade 1981). The court below held that Proclamation No. 4074, 85 Stat. 926 (1971), which established a 10-percent ad valorem duty on dutiable imports, was a valid exercise of the authority delegated to the President by the Trading With the Enemy Act, 50

Opinion of the United States Court of Appeals for the Federal Circuit Affirming the Judgment of the United States Court of International Trade, 593 F. 2d 1189 (1982).

U.S.C. app. § 5(b), to regulate imports at a time of declared national emergency. The court below also held that section 9(a) of the Trading With the Enemy Act does not require the government to return the surcharges collected under Presidential Proclamation 4074, as that section is inapplicable to the regulatory provisions of section 5(b). The United States Court of International Trade therefore granted the government's motion for summary judgment. We *affirm.*

During the summer of 1971, the United States was faced with an economic crisis. The nation suffered under an exceptionally severe and worsening balance of payments deficit. The gold reserve backing of the U.S. dollar had dropped from $17.8 billion in 1960 to less than $10.4 billion in June of 1971, reflecting a growing lack of confidence in the U.S. dollar abroad. Foreign exchange rates were being controlled by some of our major trading partners in such a way as to overvalue the U.S. dollar. That action, by stimulating U.S. imports and restraining U.S. exports, contributed substantially to the balance of payments deficit.[1]

As part of a program to deal with this economic crisis, the President, on August 15, 1971, issued Proclamation No. 4074, 85 Stat. 926, which established an additional 10-percent ad valorem duty upon dutiable articles imported into

---

[1] The preceding account of the economic situation facing the United States in 1971 is taken verbatim from *United States* v. *Yoshida Int'l, Inc.*, 526 F.2d 560, 567 (CCPA 1975) (footnotes omitted).

the United States.[2] Less than 5 months later, on December 20, 1971, the surcharge program was terminated by Proclamation No. 4098, 3 C.F.R. 116 (1971 Comp.). The reason for ending the surcharge program was the formulation of a multilateral agreement (the "Smithsonian Agreement") among the major industrial nations that gave

---

[2] Presidential Proclamation 4074 states in relevant part that:

"WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

"WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

* * * * *

"A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

"B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad volorem. Such supplemental duty shall be imposed on all dutiable articles * * * provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply." [Proclamation No. 4074, 85 Stat. 926, 926-27 (1971).]

promise of ending the balance of payments problem. *See United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 568-69 (CCPA 1975).

Unfortunately, the termination of Presidential Proclamation 4074 did not end the controversy surrounding the surcharge program. Many importers subsequently challenged the validity of Proclamation 4074, alleging that it was an *ultra vires* presidential act. The United States Court of Customs and Patent Appeals, however, held that Presidential Proclamation 4074 was a valid exercise of the authority delegated to the President by section 5(b) of the Trading With the Enemy Act[3] (TWEA) to regulate im-

---

[3] Section 5(b) provides in relevant part that:

"(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

"by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest

(*footnote continued on following page*)

ports at a time of declared national emergency. *See Alcan Sales* v. *United States*, 534 F.2d 920 (CCPA), *cert. denied*, 429 U.S. 986 (1976); *Yoshida*, 526 F.2d at 584.

Following the *Yoshida* and *Alcan Sales* decisions, several importers initiated a new wave of litigation in the federal district courts. The basis for their actions was section 9(a) of the TWEA, which permits persons who are not enemies or allies of enemies to seek recovery of property seized under the TWEA.[4] Those plaintiffs contended that section

---

(*footnote continued from preceding page*)

of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *." [50 U.S.C. app. § 5(b) (1976).]

Section 5(b) was amended in 1977, Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. I, §§ 101(a), 102, 103(b), 91 Stat. 1625, 1625-26, but the amendment is not pertinent to the issues presented in this litigation.

[4] Section 9(a) provides in relevant part that:

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so

(*footnote continued on following page*)

9(a) requires the government to return property taken under either the seizure or regulatory provisions of section 5(b) upon a showing of no enemy interest in that property. The courts that were confronted with this issue, however, held that section 9(a) does not apply to the regulatory provisions of section 5(b). *See Cornet Stores* v. *Morton*, 632 F.2d 96 (9th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981); *Henry Pollak, Inc.* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), *aff'd mem.*, 593 F.2d 1371 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 836 (1979). Because no section 9(a) claim was presented, the *Cornet Stores* and *Henry Pollak* courts held that litigation involving the surcharge program did not belong in district court, but was within the exclusive jurisdiction of the United States Customs Court under 28 U.S.C. § 1582 (1976).[5]

(*footnote continued from preceding page*)

held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides * * *." [50 U.S.C. app. § 9(a) (1976).]

[5] The Customs Courts Act of 1980 changed the name of the United States Customs Court to the United States Court of International Trade. Also, section 28 U.S.C. § 1582 was repealed and replaced by 28 U.S.C. § 1581. *See* Customs Courts Act of 1980, Pub. L. No. 96-417, §§ 101, 201, 94 Stat. 1727, 1727-29.

Opinion of the United States Court of Appeals for the Federal Circuit Affirming the Judgment of the United States Court of International Trade, 593 F. 2d 1189 (1982).

In response to these decisions, Alcan Sales instituted this action in the United States Court of International Trade (formerly the United States Customs Court) seeking the return of its surcharge payments under section 9(a) of the TWEA. The court held that the TWEA confers two distinct and independent powers upon the President: (1) the power to regulate; and (2) the power to seize and hold property. *See Alcan Sales* v. *United States*, 528 F. Supp. 1159, 1162 (Ct. Int'l Trade 1981). Section 9(a)'s application, however, is limited to actions involving an exercise of the President's seizure or vesting powers under section 5(b). Because the import surcharge program was authorized by section 5(b)'s regulatory provisions, it did not constitute a vesting within the meaning of section 5(b). Therefore, the court held that section 9(a) was inapplicable to appellant's action. The court did not purport to have any jurisdiction under section 9(a), and indeed it does not. If a section 9(a) claim had been presented, then appellant's exclusive remedy would have been in the federal district courts. *See* 50 U.S.C. app. §§ 7(c), 9(a) (1976).

The issue in this appeal is whether section 9(a) of the Trading With the Enemy Act (TWEA) is applicable to those provisions of section 5(b) of the TWEA that empower the President to regulate foreign trade. Every court to consider this issue has determined that it is not. *See Cornet Stores*, 632 F.2d at 97-98, 98 n.2; *Pollak*, 444 F. Supp. at 59 n.2. We agree with those decisions as well as the one now under review.

When the Trading With the Enemy Act was first enacted in 1917 its application was restricted to wartime. *See* Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. The purpose of the

Act was to enable the President to prohibit trade with wartime enemies and to seize enemy-owned property. *See Pollak,* 444 F. Supp. at 59. In order to ensure that U.S. citizens would have a remedy if their property was seized under the TWEA, Congress enacted section 9(a), which established an administrative and judicial procedure by which persons who were not enemies or allies of enemies could seek recovery of property seized under the TWEA. In 1933 and again in 1941, however, Congress greatly expanded the scope of the President's powers under section 5(b) of the TWEA. *See* Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1, 1-2; Act of Dec. 18, 1941, ch. 593, tit. III, § 301, 55 Stat. 838, 839-40. Under the amendments to section 5(b), the President was delegated extensive powers to regulate international economic transactions involving property in which any foreign nation or citizen, friendly or otherwise, had an interest. These powers could be exercised during either a war or period of declared national emergency. Therefore, after 1941, it was clear that section 5(b) conferred two distinct and independent powers upon the President: (1) the power to seize or "vest" property; and (2) the power to regulate.

Although Congress chose to expand significantly the President's authority under section 5(b), it did not concurrently amend the recovery provisions of section 9(a). For that reason, section 9(a) must be construed to apply as originally enacted—to those provisions of section 5(b) that empower the President to vest property. *See Cornet Stores,* 632 F.2d at 97.

Common sense also dictates that section 9(a) retain its original limitations. In amending section 5(b), Congress delegated broad and extensive powers to the President in order that he could deal effectively with national emer-

gency situations. *See Yoshida,* 526 F.2d at 573. Extending section 9(a) to the regulatory provisions of section 5(b), however, might severely hinder the President's ability to deal effectively with a national emergency. In this case, for example, it is doubtful that the surcharge program imposed by Presidential Proclamation 4074 would have been effective if section 9(a) required the government to return the surcharges it collected. The purpose of a surcharge on imports is to decrease the demand for foreign goods by increasing the price to consumers. If importers know that they will receive a refund of any surcharges paid, then they will be less likely to pass the cost of the surcharge through to consumers. A surcharge program subject to section 9(a) would thus be less effective in decreasing the demand for foreign goods and alleviating a balance of payments problem. Therefore, it seems highly unlikely that Congress would give the President broad regulatory powers under section 5(b) in order that he could deal effectively with national emergencies and then subject these powers to section 9(a), which might render the delegated powers useless.

Thus, section 9(a) "confers jurisdiction upon the federal district courts only to consider challenges to the wartime applications of Section 5(b) [*i.e.,* the seizure or vesting of property] and to identifications of parties as 'enemies'." *Pollak,* 444 F. Supp. at 60 n.2. It is inapplicable to a surcharge program on imports that is authorized by the regulatory provisions of section 5(b). *See Cornet Stores,* 632 F.2d at 97-98, 98 n.2; *Pollak,* 444 F. Supp. at 60 n.2.

Although section 9(a) does not apply to the regulatory provisions of section 5(b), it does not necessarily follow that the United States Court of International Trade is the

proper forum for all actions arising under the regulatory provisions of section 5(b).[6] A court must first characterize the action. Only if the section 5(b) action bears a "substantial relation to traditional customs purposes," *Jerlian Watch Co.* v. *United States*, 597 F.2d 687, 691 (9th Cir. 1979), will the United States Court of International Trade have jurisdiction. As this is the case here, litigation involving the import surcharge program is within the exclusive jurisdiction of the United States Court of International Trade. *See Cornet Stores*, 632 F.2d at 100; *Pollak*, 444 F. Supp. at 59-60. Prior litigation under former section 1582 (now section 1581)[7] has conclusively established that Presidential Proclamation 4074 was a valid exercise of the authority delegated to the President under the regulatory provisions of section 5(b). *See Alcan Sales*, 534 F.2d at 920; *Yoshida*, 526 F.2d at 584.

Appellant now contends, however, that the United States Court of International Trade has jurisdiction under sec-

---

[6] The regulatory provisions of section 5(b) delegate broad and varied powers to the President, which permit the President to engage in a wide range of economic regulations. Some of the President's regulatory actions may come within the jurisdiction of the federal district courts, while others may be within the exclusive jurisdiction of the United States Court of International Trade. *See Henry Pollak, Inc.* v. *Blumenthal*, 444 F. Supp. 56, 59 (D.D.C. 1977), *aff'd mem.*, 593 F.2d 1371 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 836 (1979).

[7] Section 1581 contains the major jurisdictional grants of authority to the United States Court of International Trade. It substantially restates, with some modifications, the jurisdictional authority of the former United States Customs Court under 28 U.S.C. § 1582. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 44-48, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3755-60.

tion 1581 to hear its section 9(a) claim and to return its surcharge payments notwithstanding the validity of Presidential Proclamation 4074. This argument is without merit. For the reasons stated above, section 9(a) is irrelevant to litigation involving an import surcharge program established under the regulatory provisions of section 5(b). In fact, the inapplicability of section 9(a) to section 5(b)'s regulatory provisions is one of the reasons why the United States Court of International Trade has exclusive jurisdiction over this matter.

Therefore, after thorough consideration of the parties' submissions and after oral argument, the decision of the United States Court of International Trade granting the government's motion for summary judgment is affirmed.

Judgment of United States Court of International Trade Granting the United States Summary Judgment and Accompanying Opinion, 1 CIT , 528 F. Supp. 1159 (1981).

Judgment

UNITED STATES COURT OF
INTERNATIONAL TRADE

NILS A. BOE, Judge

Court No. 77-8-01685

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

That the motion of the defendant, in the alternative, for summary judgment is granted, and the above-entitled action of the plaintiff be and is hereby in all matters dismissed.

NILS A. BOE
Judge of the United States Court
of International Trade

Dated at New York, N.Y.
December 29, 1981

Opinion

BOE, Judge: It, indeed, is an illustrative exercise in the art of jurisprudential survival that the surcharge issue contained in the instant action, first, having been the subject matter of litigation presented to this court and the appropriate appellate forums,[1] thence the subject matter of litigation presented to the U. S. District Court, District of Columbia,[2] and the U. S. District Court for the Central District of California[3] and their respective appellate forums, emerges again in the present proceedings.

Due to the passage of time since this issue was originally before this court, the following facts are reviewed.

On August 15, 1971, the President in declaring a national emergency "* * * to strengthen the international economic position of the United States" issued Presidential Proclamation 4074 assessing a surcharge in the form of a supplemental duty in the amount of 10% on all imported dutiable merchandise except certain merchandise specifically exempted therefrom.[4] The 10% surcharge was

---

[1] *Yoshida International* v. *United States*, 73 Cust. Ct. 1, 378 F. Supp. 1155 (1974), *rev'd.*, 63 CCPA 15, 526 F. 2d 560 (1975); *Alcan Sales* v. *United States*, 63 CCPA 83, 534 F. 2d 920 (1976), *cert. denied*, 429 U.S. 986 (1976).

[2] *Henry Pollack* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), *aff'd. mem.*, 593 F. 2d 1371 (D.C. Cir.), *cert. denied*, 444 U.S. 836 (1979).

[3] *Cornet Stores* v. *Morton*, 632 F. 2d 96 (9th Cir. 1980), *cert. denied*, —— U.S. ——, 101 St. Ct. 2016 (1981).

[4] Presidential Proclamation 4074 in relevant part stated:

> WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

(*footnote continued on following page*)

terminated on December 20, 1971, by Presidential Proclamation 4098 (36 Fed. Reg. 24201 (1971)). The subject merchandise in the instant action was imported into the United States from Canada and entered on November 30, 1971. Upon liquidation a protest was filed by the plaintiff and a denial thereof was made by the Customs Service. A summons was timely filed in this court.

The plaintiff in the instant action does not challenge the prior decision of the CCPA in *United States* v. *Yoshida International,* 63 CCPA 15, 526 F. 2d 560 (1975), in which it was determined that Presidential Proclamation 4074 was a valid exercise of the authority granted to the President

---

(*footnote continued from preceding page*)

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

* * * * * * *

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles * * * provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

by the Congress in section 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. section 5(b) to regulate imports. Predicating its claim, however, under section 9(a) of the Trading With the Enemy Act (TWEA), plaintiff now seeks recovery of the supplemental duty paid by it together with interest. The fact that it neither was nor is an enemy or ally of an enemy of the United States as defined in section 2 of the TWEA, plaintiff contends, causes the retention of the surcharge paid by it to be an unlawful "taking" and, accordingly, recoverable in this proceeding.

In bar to plaintiff's claim, the defendant asserts four principal defenses: (1) lack of jurisdiction of this court over the subject matter of the instant action, (2) the statute of limitations barring plaintiff's claim under section 9(a) of the TWEA, (3) *res adjudicata* and (4) collateral estoppel.

In its consideration of this cause of action the court necessarily must initially determine the validity of defendant's alleged affirmative defense that jurisdiction does not lie with this court. This jurisdictional defense of the defendant is based upon the provision contained in section 9(a) of the TWEA that in any action brought thereunder to recover property "held" and/or "vested" pursuant to section 5(b) by the United States, suit may be instituted "in the district court of the United States." Accordingly, the defendant contends, jurisdiction with respect thereto has been placed by the Congress exclusively in the United States district court.

The plaintiff asserts, and with some justification, that it has been placed on the horns of a dilemma by defendant's jurisdictional defense in light of the circuitous journey which has been necessitated to date in connection with an attempt to seek a full judicial resolution of the surcharge issue and, in particular, with respect to the right of re-

covery of the supplemental duty paid by the plaintiff under the provisions of section 9(a) of the TWEA. The import of the decisions rendered in the surcharge cases adjudicated in the United States district courts and affirmed upon appellate review, in essence, held that the Customs Court, now the United States Court of International Trade, properly assumed jurisdiction over challenges to the surcharge imposed by Presidential Proclamation 4074 and that by virtue of the exclusive jurisdiction granted to this court by the provisions of 28 U.S.C. § 1582 (1976), the United States district court did not possess jurisdiction of the subject matter relating to imports.[5]

Notwithstanding the plaintiff in its argument has relied principally upon the provisions of section 9(a) of the TWEA to provide the relief sought in the instant proceeding, it will be noted that among other bases the plaintiff has specifically claimed jurisdiction under 28 U.S.C. § 1581 (a) providing:

> § 1581. Civil action against the United States and agencies and officers thereof

---

[5] In the decisions in *Pollack* v. *Blumenthal, supra,* and *Cornet Stores* v. *Morton, supra,* the respective United States courts did not address at length the applicability of section 9(a) with respect to the recovery of property in the form of the supplemental duties imposed by the surcharge in issue and paid by the plaintiffs. Nor did the decisions therein address at length the exclusivity of the jurisdiction of the United States district court wth respect to the claim brought allegedly pursuant to section 9(a), as herein asserted. Principal reference thereto is contained only by way of a footnote in the *Pollack* decision, stating:

> • • • It is obvious on its face that 9(a) confers jurisdiction upon the federal district courts only to consider challenges to the wartime application of section 5(b) and to identifications of parties as 'enemies.' Section 9(a) is not relevant to those portions of Section 5(b) which empower the President to regulate foreign trade during peacetime.

444 F. Supp. at 59-60, n. 2.

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.[6]

It is by virtue of the jurisdiction acquired pursuant to the foregoing statutory provision that this court proceeds with the determination of the instant action and, accordingly, denies the defendant's motion to dismiss the action of the plaintiff for lack of jurisdiction.

In accepting jurisdiction over the subject matter herein it cannot be said that the court is so circumscribed as to preclude its consideration of statutory provisions which may have been alleged to be applicable and/or controlling. In other words, instead of skirting the parameters of section 9(a) of the TWEA, with only oblique references thereto, this court deems it not only proper but obligatory at the outset to consider the applicability of this section of the Trading With the Enemy Act with respect to the claim which plaintiff asserts has been neither determined on its merits in *United States* v. *Yoshida International, supra, Alcan Sales* v. *United States, supra,* nor in any subsequent action.

From the time of the initial enactment of the Trading With the Enemy Act, it is clear that two distinct and independent powers were conferred therein on the President by the Congress: (1) the power to "regulate" and (2) the power to "seize" and "hold" property. In the original act enacted in 1917 the former power was conferred by section 5(b), the latter power by section 7(c). It was solely with respect to the property seized and held by the direc-

---

[6] Though enacted October 10, 1980, more than six years after this suit was filed, this section was made applicable to the suit at hand by Act of December 17, 1980, P. L. 96-542, 94 Stat. 3209 section (a) which declared that 28 U.S.C. § 1581(a) was applicable to civil actions pending on or commenced on or after November 1, 1980.

tion of the President in accordance with the power conferred upon him by section 7(c) that authority was granted to a claimant, not an enemy or ally of an enemy, by section 9 to institute a suit in equity in the district court of the United States to establish his right title or interest thereto. Through successive amendments, particularly with respect to section 5(b), the powers of the President under the TWEA were from time to time expanded. In consideration of the surcharge presently in issue, we are, accordingly, guided by section 5(b) of the Act as amended in 1941.[7]

---

[7] Section 5(b) of the Trading With the Enemy Act as amended on December 18, 1941 provides:

> (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfer of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholdng, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any persons, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time

(*footnote continued on following page*)

While amendments to the respective sections of the TWEA were made from time to time, it is noteworthy that section 9(a) continued to remain without change and in its original form as enacted. This fact served as the occasion for the Supreme Court in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), to consider the relationship betwen section 2, section 5(b) as amended and section 9(a) of the Act and their respective applications. Although the Court therein expressly recognized that the amended section 5(b) "* * * granted the President the power to vest in an agency designated by him 'any property or interest of any foreign country or national thereof,' " the footnote contained in the Court's decision makes it abundantly clear that the amended section 5(b) *also*

(*footnote continued from preceding page*)

by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

granted to the President the additional powers enumerated therein, specifically a regulatory power.[8]

It is these two distinct independent powers that this court deems necessary to address in making a determination which, hopefully, will effect a resolution of the issue involved herein. If the imposition of the supplemental duties pursuant to Presidential Proclamation 4074 constituted an act causing a "vesting" of any property or interest of any foreign country or national thereof, then and in that event a claim for the recovery of such property might be maintained by the plaintiff under section 9(a). On the other hand, if the imposition of the supplemental duty imposed by Presidential Proclamation 4074 was in fact only an exercise of a delegated authority under section 5(b) to regulate importations during a period of national emergency, then and in that event section 9(a) and the provisions thereof are inapplicable. It is only if the applicability of section 9(a) is confirmed that it becomes necessary to reach the issue of the jurisdiction of this court thereunder.

The court concludes that plaintiff's claim predicated under section 9(a) of the TWEA is misconceived and misplaced. The provisions of section 9(a) serve a purpose directly related to the "vesting" power granted to the President by section 5(b). It is by virtue of section 9(a) that the constitutionality of the "vesting" power is in-

---

[8] The footnote contained in the Court's decision stated:

> Section 5(b)(1), as amended, also granted the President the power to 'investigate, regulate, direct and compel, . . . any . . . importation . . .' At 485, n. 4.

See also, United States v. *Yoshida International, supra,* wherein our appellate court recognized that section 5(b) granted to the President the power to "vest" as well as the power to "regulate." At 24, n. 17.

sured. In *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958), the United States Supreme Court stated:

> Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. (Citations omitted.)

This court, however, has not been persuaded that the purpose and intent of the President in imposing the surcharge in question was to sequester and hold property in which any foreign country or a national thereof had an interest. Neither the declaration of the emergency by the President nor the manner of imposition of the surcharge would lend credence to such a contention. The preservation of our monetary reserves, the maintenance of an international competitive position, the preservation of a favorable balance of payments position, indeed, are objectives which are not consonant with the objective of impounding foreign assets within this country. The uniform rate of supplemental duty imposed on imports from all nations without discrimination likewise fails to support any attempted rationalization that the imposition of the surcharge by the President constituted an act of appropriation of the property or property interests of a foreign nation or a national thereof creating a claim which could be asserted by a citizen of the United States instituting a legal action for the recovery thereof under the provisions of section 9(a) of the TWEA.

As afore-indicated, plaintiff has acknowledged that it does not take issue with the decision of our appellate court in the case of *United States* v. *Yoshida International, supra.*

In view of this acknowledgment it is difficult to ascertain the consistency of plaintiff's present contention that a determination with respect to the validity of the surcharge in question and that a recovery of the additional duties paid by the plaintiff as a result of the imposition of such surcharge now should be made in accordance with the provisions of section 9(a) of the TWEA.

The decision of our appellate court in the *Yoshida* case is explicit in its holding that the President was delegated the authority by section 5(b), during war or national emergency, to "regulate imposition." As stated by the court therein the sole question which remained to be determined was "what means of execution of the delegated power are permissible." 63 CCPA at 24. The court thereupon, recognizing the long-established constitutional principle that the power to tax and impose duties on imports may be employed in the exercise of the separate and distinct power to regulate commerce, upheld the validity and constitutionality of the surcharge imposed by Presidential Proclamation 4074 and the supplemental duties assessed thereunder. To again review at length the authorities supportive of our appellate court's determination in *Yoshida* would be only time-consuming and without significant purpose. *See: Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 202 (1824); *Hampton & Co.* v. *United States,* 276 U.S. 394, 411 (1928); *McGoldrick* v. *Gulf Oil Corp.,* 309 U.S. 414, 428 (1940).

However, the plaintiff in an effort to circumvent the *Yoshida* decision seeks refuge in the statement contained therein that "the surcharge was not imposed to raise revenue but to provide the U.S. external position with some temporary protection." 63 CCPA at 29, n. 26. Contending that the President thus was "taking" property of American citizens for the public good in time of national emergency to force foreign countries having an interest

in such property to "come to terms" on an international monetary agreement, the plaintiff concludes that it has been deprived of its constitutional right of just compensation. Suffice it to say, plaintiff's argument must be found wanting in relevancy as well as in substance. The provision contained in Presidential Proclamation 4074 that the total duty, including the 10% supplemental duty, could in no event exceeded the rate prescribed in column 2 of the Tariff Schedules of the United States, negates the hypothesis of the plaintiff that the imposition of the surcharge was of such an arbitrary, unreasonable and confiscatory character as to constitute a "taking" without just compensation. The incongruity of plaintiff's contention may be evidenced by the recent decision of the United States Supreme Court in the case of *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104, 124 (1978):

> 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example.

There are occasions, however, when certain decisions, despite the dust which might have accumulated upon their yellowed pages, place in perspective more accurately the pertinent and applicable principles of law than can be articulated in 10,000 words. In the case of *Board of Trustees* v. *United States,* 289 U.S. 48, 58-59 (1933), Chief Justice Hughes has set forth with singular clarity the distinction between the separate and independent powers

to tax and lay duties and the laying of duties in the exercise of that independent power to regulate commerce.

> It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. *Gibbons* v. *Ogden, supra,* p. 201. It is also true that the taxing power embraces the power to lay duties. Art I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons* v. *Ogden, supra,* p. 202. 'Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves* v. *Slaughter,* 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 Story on the Constitution, § 1088. It has not been questioned that this power may be exerted by laying duties 'to countervail the regulations and restrictions of foreign nations.' *Id.,* § 1087. And the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its requirements are not the less regulatory because they are not prohibitory or retaliatory. They embody the congressional conception of the extent to which regulation should go. But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce

> permeates the entire congressional plan. The revenue resulting from the duties 'is an incident to such an exercise of the power. It flows from, but does not create the power.' *Id.*

From the explicit language of Presidential Proclamation 4074 this court is satisfied that, as stated in *Board of Trustees* v. *United States, supra,* the purpose to regulate foreign commerce under the authority delegated to him by section 5(b) permeated the entire plan of the President.

Jurisdiction of the instant action having been acquired pursuant to 28 U.S.C. section 1581(a), the court finds that section 9(a) of the TWEA is inapplicable to the determination of the issue herein. The imposition of the surcharge in question was a valid exercise of authority delegated to the President by section 5(b) of the TWEA to regulate importations at a time of a declared national emergency and for the purposes set forth with particularity in Presidential Proclamation 4074. The imposition of the surcharge did not constitute an act causing a "vesting" within the meaning of section 5(b). No conclusion can be reached therefore by this court other than the decisions of our appellate court in the case of *United States* v. *Yoshida International, supra,* and in the case of *Alcan Sales* v. *United States, supra,* are, in fact, stare decisis of the issues herein.

In view of the foregoing it is unnecessary to consider the additional defenses asserted by the defendant.

The motion of the plaintiff for summary judgment, accordingly, is denied. The motion of the defendant, in the alternative, for summary judgment, is granted.

Let judgment be entered accordingly.

Office-Supreme Court, U.S.
FILED
APR 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1384

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALCAN SALES, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Alcan Sales v. *United States*, 534 F.2d 920, cert. denied, 429 U.S. 986 2

Andrus v. *Allard*, 444 U.S. 51 7

Brushaber v. *Union Pac. R.R.*, 240 U.S. 1 5

Buttfield v. *Stranahan*, 192 U.S. 470 6

Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480 4

Cornet Stores v. *Morton*, 632 F.2d 96, cert. denied, 451 U.S. 937 4

Dames & Moore v. *Regan*, 453 U.S. 654 ..... 2, 4, 6

FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 6

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 7

Hampton & Co. v. *United States*, 276 U.S. 394 6

Henry Pollak, Inc. v. *Blumenthal*, 444 F. Supp. 56, aff'd mem., 593 F.2d 1371, cert. denied, 444 U.S. 836 4

Norwiegan Nitrogen Co. v. *United States*, 288 U.S. 294 6

Propper v. *Clark*, 337 U.S. 472 4

Page

Cases—Continued:

Societe Internationale v. *Rogers*,
357 U.S. 197 4

United States v. *Yoshida International, Inc.*
526 F.2d 560 ..... 2, 6

Constitution, statutes and regulations:

U.S. Const. :

Art. VI 6

Amend. V (Taking Clause) 5, 7

Act of July 4, 1789, ch. 2, Section 1,
1 Stat. 24 6

Customs Courts Act of 1980, 28 U.S.C.
(& Supp. V) 251 *et seq.* :

28 U.S.C. (Supp. V) 251 3
28 U.S.C. (Supp. V) 1581 3
28 U.S.C. (Supp. V) 1581(a) 3, 7
28 U.S.C. (Supp. V) 1582 3

International Emergency Economic Powers Act,
50 U.S.C. (Supp. V) 1701 *et seq.* 2

National Emergencies Act, 50 U.S.C.
(& Supp. V) 1601 *et seq.* 2

Pub. L. No. 95-223, Section 101(a),
91 Stat. 1625 2

Tariff Act of 1930, 19 U.S.C. (& Supp. V)
1201 *et seq.* :

19 U.S.C. (& Supp. V) 1514 7

19 U.S.C. (Supp. V) 1515 3

Page

Constitution, statutes and regulations—Continued:

Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 *et seq.* :

Section 122, 88 Stat. 1987 (19 U.S.C. 2132) 2, 6

Section 611, 88 Stat. 2075 (19 U.S.C. 1515 note) 7

Trading With The Enemy Act, 50 U.S.C. App. (& Supp. V) 1 *et seq.* :

Section 5(b), 50 U.S.C. App. (& Supp. V) 5(b) 1, 4

Section 5(b)(1), 50 U.S.C. App. 5(b)(1) 2

Section 9(a), 50 U.S.C. App. 9(a) 1, 2, 3, 4, 6

Tucker Act:

28 U.S.C. (Supp. V) 1346(a)(2) 6

28 U.S.C. (Supp. V) 1491 6

28 U.S.C. 1581 3

28 U.S.C. 1582 7

Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 comp.) 2

Proclamation No. 4098, 3 C.F.R. 94 (1971-1975 comp.) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1384

ALCAN SALES, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that Section 9(a) of the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. 9(a), authorized it to bring an action to recover an import surcharge lawfully imposed by the President under Section 5(b) of that Act, 50 U.S.C. App. (& Supp. V) 5(b).

1. In 1971, the President responded to a growing domestic and international economic crisis by imposing a 10% ad valorem surcharge on most dutiable imports. This surcharge was imposed pursuant to Section 5(b)(1) of the TWEA, 50 U.S.C. App. 5(b)(1), which, among other things, empowered the President to regulate international trade "[d]uring * * * any period of national emergency declared

by the President."[1] Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 comp.) (Pet. App. 17a-21a). The President removed the surcharge less than five months later (Proclamation No. 4098, 3 C.F.R. 94 (1971-1975 comp.)) (Pet. App. 22a-24a), after the "Smithsonian Agreement" among ten major industrial nations "gave promise of ending the balance of payments problem" (*id.* at 34a-35a).

While in effect, the surcharge was imposed on certain aluminum ingots imported by petitioner from Canada. Petitioner's challenge to the President's authority to impose the surcharge was rejected by the United States Court of Customs and Patent Appeals (*Alcan Sales* v. *United States*, 534 F.2d 920 (C.C.P.A.), cert. denied, 429 U.S. 986 (1976) ("*Alcan I*")), which relied upon its comprehensive decision concerning the same issue in *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).

2. The same surcharge was imposed on the entry of another shipment of aluminum imported by petitioner, and petitioner's protest was again denied. Petitioner then brought this action to recover the surcharge under Section 9(a) of the TWEA in the United States Court of International Trade (formerly the United States Customs Court). Petitioner asserted jurisdiction under both Section 9(a) and

---

[1] In 1977, Congress deleted the reference in Section 5(b)(1) (50 U.S.C. App. 5(b)(1)) to a "period of national emergency declared by the President." Pub. L. No. 95-223, Section 101(a), 91 Stat. 1625. The President still has the power to declare an emergency and impose economic restrictions under the National Emergencies Act, 50 U.S.C. (& Supp. V) 1601 *et seq.*, and the International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) 1701 *et seq.* See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Congress has also specifically authorized the President, when required by international monetary difficulties, to impose by proclamation temporary import surcharges and temporary limitations through the use of import quotas. 19 U.S.C. 2132.

28 U.S.C. (Supp. V) 1581[2] (Pet. App. 47a-48a). Section 9(a) permits the filing of claims for property seized by or transferred to the Alien Property Custodian, and it authorizes suit in district court if such a claim is denied. Under 28 U.S.C. (Supp. V) 1581, the Court of International Trade is given exclusive jurisdiction of civil actions contesting the denial of tariff protests under Section 515 of the Tariff Act of 1930, 19 U.S.C. (Supp. V) 1515.

Petitioner did not challenge the Court of Customs and Patent Appeals' prior decisions in *Yoshida* or *Alcan I*, which upheld the validity of the surcharge imposed in Proclamation 4074 (Pet. App. 45a). Instead, petitioner asserted (*id.* at 46a) that the surcharge amounted to a "taking" of property that was recoverable under Section 9(a). The United States argued that the Court of International Trade lacked jurisdiction over the subject matter because actions under Section 9(a) lie only in district court; that petitioner's action under Section 9(a) of the TWEA was barred by the statute of limitations; and that because of petitioner's prior unsuccessful challenge to the surcharge in *Alcan I*, this action was foreclosed by the doctrines of res judicata and collateral estoppel (Pet. App. 46a).

The Court of International Trade concluded that it had subject matter jurisdiction under 28 U.S.C. (Supp. V) 1581(a) but granted summary judgment for the United States on the ground that Section 9(a) of the TWEA was inapplicable to this case (Pet. App. 56a). The court noted (*id.* at 48a-51a) that the TWEA confers upon the President

---

[2]The United States Customs Court became the United States Court of International Trade on November 1, 1980, pursuant to the Customs Court Act of 1980, 28 U.S.C. (Supp. V) 251. The jurisdictional provision for actions against the United States in the Customs Court, 28 U.S.C. 1581, was repealed and replaced by 28 U.S.C. (Supp. V) 1582, which provides for such actions in the Court of International Trade.

two separate powers: (1) the power to regulate international commerce and (2) the power "to vest in an agency designated by him 'any property or interest of any foreign country or national thereof' "(*Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 485 (1947)). The court then concluded (Pet. App. 51a-52a) that Section 9(a) applies only when the latter power is exercised.

The court of appeals affirmed (Pet. App. 31a-42a; 693 F.2d 1089 (1982)). The court agreed with every other court that has addressed the issue that Section 9(a) "is [not] applicable to those provisions of section 5(b) of the TWEA that empower the President to regulate foreign trade" but rather applies only to actions involving an exercise of the President's power to seize and hold enemy property (Pet. App. 38a). See also *Cornet Stores* v. *Morton*, 632 F.2d 96 (9th Cir. 1980), cert. denied, 451 U.S. 937 (1981); *Henry Pollak, Inc.* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), aff'd mem., 593 F.2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836 (1979).

3. The decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and therefore does not merit further review.

a. Petitioner does not dispute the President's authority to impose the surcharge under Section 5(b) of the TWEA (Pet. App. 45a-46a). Indeed, petitioner could not do so in light of *Alcan I*, which decided that very issue against it. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 671-673 (1981); *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); *Propper* v. *Clark*, 337 U.S. 472, 493 (1949).

Instead, petitioner argues that, even though the surcharge is valid under Section 5(b), it constitutes a "vesting" of its property. Petitioner therefore maintains that it is entitled to recover the lawfully imposed surcharge under Section 9(a). This argument, which would make nonsense

of the statute, was properly rejected by both courts below. As the court of appeals remarked (Pet. App. 40a), "it seems highly unlikely that Congress would give the President broad regulatory powers under section 5(b) in order that he could deal effectively with national emergencies and then subject these powers to section 9(a), which might render the delegated powers useless."

Petitioner's reasoning would produce absurd results. Although the government could constitutionally impose taxes, customs, and duties, those who pay them would be entitled to recover those sums under the Taking Clause of the Fifth Amendment. This Court rejected such an argument long ago. "[T]he Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause [of the Fifth Amendment]." *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24 (1916) (progressive income tax on corporations not Fifth Amendment taking of property of shareholders without compensation).

Petitioner's contention is not supported by any of the cases involving the TWEA upon which it relies. Those cases involved property that had been seized by the government as belonging to or tainted by interests of enemies of the United States. See, *e.g.*, *Societe Internationale* v. *Rogers*, *supra*. The sole function of Section 9(a) of the Act is to permit persons who claim not to be enemies to establish that fact and to recover for their interests in any property seized. Here, the President was not exercising his authority to seize enemy property; he was instead exercising his authority to regulate foreign economic activity by imposing a surcharge on imports. It is therefore obvious that Section 9(a) has nothing to do with this case and does not authorize recovery of the lawfully imposed surcharge.

The Court of Customs and Patent Appeals has correctly recognized the breadth of this Court's decisions concerning

the constitutional power to impose duties on foreign trade. *United States* v. *Yoshida International Inc., supra,* 526 F.2d at 580. The Constitution does not confer the right to engage in foreign commerce free of restrictions. Thus, "a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution" (*Buttfield* v. *Stranahan,* 192 U.S. 470, 493 (1904)). As Justice Cardozo wrote for the Court in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 318 (1933), "[n]o one has a legal right to the maintenance of an existing rate or duty." See also *FEA* v. *Algonquin SNG, Inc.,* 426 U.S. 548, 559 (1976) (upholding Presidential license fee to reduce dependence on foreign oil).[3] Moreover, since Congress explicitly authorized the President to impose import surcharges to deal with balance of payments problems in the Tariff Act of 1974, 19 U.S.C. 2132, this case has no continuing significance.

b. Even assuming *arguendo* that petitioner had a colorable "taking" claim on the basis of the President's surcharge, the courts below lacked jurisdiction to consider it. A claim for such a "taking" may only be brought under the Tucker Act, and jurisdiction over such actions lies in the Claims Court (28 U.S.C. (Supp. V) 1491) or, if the claim does not exceed $10,000, in district court (28 U.S.C. (Supp. V) 1346 (a)(2)). See *Dames & Moore* v. *Regan, supra,* 453

---

[3]Import duties designed to foster the well-being of the United States date from the beginning of the Republic. Indeed, the first order of business of the First Congress, after establishing the oaths of office under Article VI of the Constitution, was to enact duties on imports "for the support of the government, for the discharge of debts of the United States, *and the encouragement and protection of manufactures* * * *," Act of July 4, 1789, ch. 2, Section 1, 1 Stat. 24 (emphasis added). The validity of such protective duties and the right of the President to adjust the rates have long been recognized. *Hampton & Co.* v. *United States,* 276 U.S. 394 (1928).

U.S. at 689-690. An action under Section 9(a) of the TWEA is not an action to recover for a "taking"; it is an action to determine whether vested property is free of enemy taint and therefore whether the claimant is entitled to recovery.[4]

c. Petitioner's sole recourse to test the validity of the President's surcharge under Proclamation 4074 was to file a protest under the Tariff Act of 1930, 19 U.S.C. (& Supp. V) 1514.[5] Denial of such a protest is subject to review by the Court of International Trade (formerly the Customs Court) under 28 U.S.C. (Supp. V) 1581(a) (formerly 28 U.S.C. 1582). Petitioner followed this procedure in *Alcan I* and did not prevail. There is no basis for further litigation of the identical claim here.[6]

---

[4]In any event, petitioner's claim that the lawful imposition of a surcharge on imports constitutes a "taking" is frivolous. "The Takings Clause * * * preserves governmental power to regulate, subject only to the dictates of " 'justice and fairness' " (*Andrus* v. *Allard*, 444 U.S. 51, 65 (1979) (citations omitted)). "Suffice it to say that government regulation — by definition — involves the adjustment of rights for the public good * * *. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*" (*ibid.*; emphasis in original). The fundamental reason that there is no taking is that the Taking Clause is not a limitation on the constitutional power to tax or levy duties or surcharges on imports. *Brushaber* v. *Union P. R. R.*, *supra*.

[5]Congress specifically extended to five years the time for review and administrative action on duly filed protests of import surcharges under Proclamation No. 4074. Trade Act of 1974, Pub. L. No. 93-618, Section 611, 88 Stat. 2075.

[6]Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). This " 'is a rule of fundamental and substantial justice * * * which should be cordially regarded and enforced by the courts * * *' " (*id.* at 401; citation omitted). Petitioner's prior suit to challenge the validity of the surcharge and recover the sums paid pursuant to it was decided against petitioner, and this Court declined review. *Alcan I*, *supra*. Although this case involves

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1983

---

the surcharge imposed on a different shipment of goods, in all other respects the cases are identical; any legal grounds for challenging the surcharge could and should have been raised in *Alcan I*. The court of appeals correctly held that the decisions of the Court of Customs and Patent Appeals in *Alcan I* and *Yoshida* "conclusively established that Presidential Proclamation No. 4074 was a valid exercise of the authority delegated to the President under the regulatory provisions of section 5(b)" (Pet. App. 41a).

DOJ-1983-04